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Supreme Court of the United States

OCTOBER TERM, 1969

No. 1363

PETER NIVEN KIGER,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

PETER NIVEN KIGER,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on January 26, 1970.

Citations to Opinions Below

The opinion by the United States District Court for the Southern District of New York, Hon. Frederick van Pelt Bryan, U.S.D.J., is reported at 297 F. Supp. 339 (S.D.N.Y. 1969) and is printed in the appendix hereto, PA 3-14.* The opinion of the United States Court of Appeals, affirming the conviction below on the opinion below, not yet reported, is printed at PA 1-2.

* "PA . . . " refers to the appendix hereto.

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Jurisdiction

The judgment of the United States Court of Appeals was entered on January 26, 1970. On February 20, 1970, Mr. Justice Harlan issued an order extending the time within which to file this petition for writ of certiorari up to and including March 12, 1970. On March 10, 1970, Mr. Justice Harlan issued an order further extending the time within which to file this petition for writ of certiorari up to and including March 27, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented for Review

1. Whether, in the face of the petitioner's written request to a local board for a duplicate notice of classification, for the stated purpose of burning it as a symbolic expression of anti-war dissent, the action of the local board in immediately mailing to him the document requested, in violation of Selective Service Regulations pertaining to the issuance of duplicates, coupled with the failure of the local board to inform the petitioner of the illegality of his proposed action, in the light of a prior similar incident in which the same board advised the same registrant of his legal obligations, constituted an implied condonation of petitioner's conduct, thereby rendering his conviction, under these circumstances, a violation of due process of law under the principles established in *Raley* v. *Ohio*, 360 U.S. 423 (1959), and *Cox* v. *Louisiana*, 379 U.S. 559 (1965)?

2. Whether the action of the local board in sending petitioner a duplicate notice of classification under these ambiguous circumstances, justifiably lead the petitioner to

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believe that the newly enacted amendment punishing draft card burning was not applicable to him, thus rendering his conviction a violation of due process under the *Raley-Cox* doctrine?

3. Whether the decision of the United States Supreme Court in *United States* v. *O'Brien,* 391 U.S. 367 (1968), upholding the constitutionality of the punishment of draft card burning, should be reexamined in the light of the substantial and serious criticism which the decision has received?

4. Whether language in the *O'Brien* decision, which appears to place certain limits on the constitutional power to punish draft card burning in terms of those individuals who are effectively liable for training and service, and the reasonableness of the applicable regulations, requires a holding that the constitutionally tolerable limits have been surpassed in this case, where the registrant was outside the zone of any effective liability?

5. Whether in the proper application of the balancing test to determine if an infringement of freedom of expression is constitutionally permissible, a different balance must be struck in this case than that struck by the Supreme Court in the *O'Brien* case, inasmuch as:

(a) Unlike O'Brien, petitioner was past the age of any effective liability; and

(b) Unlike O'Brien, petitioner proved at the trial that he lacked access to the media and that the purpose of his draft card burning was to attempt to communicate with a significant audience with whom he could not otherwise lawfully communicate?

6. Whether the understanding of the majority opinion expressed by Mr. Justice Harlan in his concurring opinion in the *O'Brien* case, to the effect that there is a valid First Amendment claim where an "incidental" restriction upon free expression has, in practice, the effect of preventing communication with a significant audience with whom communication would otherwise be impossible, was met by the proof presented on behalf of petitioner in this case, and, consequently, whether his conviction must be reversed on First Amendment grounds?

7. Whether the trial court abused its discretion in refusing to accept the tendered offer of a plea of *nolo contendere*?

8. Whether the acceptance of a plea of *nolo contendere* is completely within the discretion of the trial judge, or whether any limits must be set in terms of disproportion, types of cases, infractions based on peaceful acts of conscience, or otherwise?

Constitutional Provisions, Statutes and Regulations Involved

This case involves the First and Fifth Amendments to the United States Constitution.

The statute involved is P.L. 89-152, 79 Stat. 586, enacted on August 30, 1965, which adds certain language to Section 12(b)(3) of the Act, 50 U.S.C. App. §462(b)(3), as follows:

> (b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or represen-

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tation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title (sections 451-454, 455-471 of this Appendix); or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title (said sections), or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title (said sections) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such posses-

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sion to the satisfaction of the jury. (Language inserted by amendment emphasized.)

Certain provisions of the Selective Service Regulations are likewise involved:

32 C.F.R. §1623.7:

1623.7 *Issuing a Duplicate of a Lost, Destroyed, Mislaid, or Stolen Notice of Classification (SSS Form 110).*—A duplicate Notice of Classification (SSS Form 110) may be issued to a registrant only by the local board which mailed the original Notice of Classification (SSS Form 110) to him upon his written request therefor made by letter or on a Request for Duplicate Registration Certificate or Notice of Classification (SSS Form 6) and the presentation of proof satisfactory to the local board that his Notice of Classification (SSS Form 110) has been lost, destroyed, mislaid, or stolen. When the request for the duplicate notice is made by a letter which does not present sufficient information concerning the basis for the request, the local board shall mail to the registrant a copy of Request for Duplicate Registration Certificate or Notice of Classification (SSS Form 6) and direct him to complete thereon and return to the local board the request for the duplicate notice. Whenever the local board issues a duplicate Notice of Classification (SSS Form 110), it shall mark it "Duplicate" and note the issuance of such notice upon the request, which shall be filed in the registrant's Cover Sheet (SSS Form 101).

§1631.7 of the Selective Service Regulations reads in pertinent part as follows:

§1631.7 *Action by local board upon receipt of notice of call.*

(a) When a call is placed without designation of age group or groups, each local board, upon receiving a Notice of Call on Local Board (SSS Form No. 201) from the State Director of Selective Service (1) for a specified number of men to be delivered for induction, . . . shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I-A and Class I-A-O and have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Statement of Acceptability (DD Form No. 62) at least 21 days before the date fixed for induction: . . . Such registrants, including those in a medical, dental, or allied specialist category, shall be selected and ordered to report for induction in the following order:

(1) Delinquents . . .

(2) Volunteers . . .

(3) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years . . .

(4) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who have a wife . . .

(5) Nonvolunteers who have attained the age of 26 years in the order of their dates of birth with the youngest being selected first.

Statement of the Case

Petitioner seeks certiorari from a judgment of conviction rendered by the United States District Court for the Southern District of New York, Hon. Frederick van Pelt Bryan presiding, and a sentence of three months imprisonment, after a trial without a jury, for knowingly destroying and mutilating his selective service notice of classification in violation of Section 462(b)(3) of the Universal Military Training and Service Act of 1948, as amended, 50 App. U.S.C. Section 462(b)(3).

Petitioner was indicted on May 25, 1966 (5a),* tried on January 17, 1969, convicted on March 13, 1969, see 297 F. Supp. 339 (PA 3), and sentenced on April 28, 1969.

All of the pertinent facts were stipulated to by the defendant (21a-26a). After registering with an Indiana local board on November 7, 1956, he was classified I-A, and on January 14, 1959, he was reclassified I-O as a conscientious objector (22a). He later refused to report for civilian alternative service and served a year in prison from June 1962 to June 1963. On March 24, 1966, while he was a full-time employee of the Committee for Non-[illegible]olent Action (CNVA), a pacifist organization, he burned [illegible] dup[illegible]ate Notice of Classification in the offices of the CNVA, 5 Beekman Street, New York City (26a), at a heavily attended press conference called for that purpose (37a).

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* Numbers in parentheses followed by the letter "a" refer to page numbers of petitioner's appendix in the Court of Appeals, a certified copy of which is being filed as part of the record in the court to which certiorari is addressed, pursuant to Rule 21(1) of the Rules of this Court.

All of the essential facts being admitted, petitioner's case in the trial court, on appeal to the Second Circuit, and on this petition to this Court, essentially rests on four defenses:

1) ***Condonation***

On June 4, 1966, petitioner wrote his local board requesting a duplicate classification so that he could burn it "in sympathy with other people who have done so" (87a). A duplicate notice was promptly mailed to him on January 13, 1966 (24a), unaccompanied by any warning of the legal consequence of burning the card. The local board did not solicit the advice of Indiana State Headquarters concerning the request for a duplicate (29a). Nor did the local board conduct any investigation of the facts. Nor was petitioner invited to meet with the local board or advised by any representative of Selective Service that he would be in violation of law if he burned his card (72a). Specifically, the local board did not mail to the registrant the official form prescribed by Section 1623.7 of the Selective Service Regulations, for utilization where a registrant requests a duplicate card but "does not present sufficient information concerning the basis for the request...." *Supra*, p. 6.

All of this was in sharp contrast to petitioner's experience some five years earlier when he sought to return both his notice of classification and his registration certificate to his local board "as part of a protest against the preparations for war" (22a). On that earlier occasion, both petitioner's local board and Indiana State Headquarters were actively involved in exchanges of communication concerning this novel act (27a-28a, 82a-85a),

culminating with specific advice to petitioner to carry his card so as not to be in violation of the law (84a).

2) *Absence of Effective Selective Service Liability*

On March 24, 1966, petitioner had already been classified as a conscientious objector for a substantial period of time, and he was in the fifth selection group in the order of call prescribed by Selective Service Regulations. See 32 CFR Section 1631.7(a) (1)-(5). [The regulation is set out at page 7, *supra*.]

The Government stipulated that from the time petitioner was placed in selection group 5 on August 12, 1964, up until the date of the stipulation, January 17, 1969, "national draft quotas have been such that no person in selection group 5 has been ordered for induction or alternative civilian service" (24a, 26a). See 297 F. Supp. at 342. The Selective Service Regulations provide that no registrant in selection group 5 (persons over the age of 26) may be ordered to report for induction or for alternative civilian service until all registrants in the first through fourth selection groups (consisting principally of registrants under the age of 26) have been reached in their proper order and duly called.

3) *Access to Significant Audience Through Mass Media*

Before Kiger burned his card, the Committee for Non-Violent Action, by which he was employed, sent out a press release to the major media announcing the event. On March 24, 1966, approximately 30 to 35 representatives of radio, the three major television networks and the press crowded into the Committee offices (38a, 42a, 46a). A news story with a photograph of the burning appeared on page 5 of

the New York Post (91a) and on page 3 of the New York Times (92a-93a). A news story also appeared in the New York Herald Tribune (94a). The combined circulation of those newspapers at that period was approximately 1,450,000.*

Both WCBS-TV and WNBC-TV showed films of the draft card burning on their 6 P.M. and 11 P.M. news programs. Each station has an audience of between 600,000 and 800,000 for the earlier program and approximately 800,000 for the later one. Assuming different audiences for each show, as many as 3,000,000 viewers may have seen the films of the event on those stations. The third New York network station could not confirm through its records whether or not the event had been covered (96a-97a).

In addition, radio stations WCBS and WMCA broadcast reports of the burning. Their combined audiences are in excess of 220,000. Radio stations WABC, WNEW and WINS were unable to determine whether or not they covered the event (96a-97a).

Finally, the wire services of both United Press International and Associated Press carried reports of the burning to their respective outlets, which aggregate approximately 1950 newspapers and 5200 radio and television stations (96a-97a).

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* According to the Audit Bureau of Circulations, the New York Times and the New York Post had average daily circulations of 767,239 and 380,764, respectively, for the six month period ending September 1966. 1967 Ayer Directory of Newspapers and Periodicals (Bray ed., 1967). The New York Herald Tribune had an average daily circulation of 303,178 for the six month period ending September 1965. 1966 Ayer Directory of Newspapers and Periodicals (McAllister ed., 1966).

Thus Kiger brought his protest against the war to an audience across the country that easily numbered in the millions. Despite having participated in weekly peace vigils in Times Square for over four years prior to burning his card, Kiger had never reached an aggregate audience of more than a few thousand on any one entire day (79a). Nor had any previous press conference called by the Committee for Non-Violent Action received comparable media coverage (48a).

In March 1966, when he burned his card, Kiger, as an employee of the Committee for Non-Violent Action, received a salary of less than fifty dollars a week (75a), and his total assets consisted of less than $1400 (75a). One minute of time on a network news program costs between $1500 and $3000. A page in the daily edition of the New York Times and the New York Post cost approximately $7,200 and $2,640 respectively (95a). The Committee did not have financial resources to publicize its views through the mass media and ultimately went out of existence in part because of its financial problems (49a).

4) *Nolo Contendere*

Prior to trial, petitioner moved for leave to enter a plea of *nolo contendere* under Rule 11 of the Federal Rules of Criminal Procedure. The application for the plea was supported by a memorandum which stressed petitioner's non-violent background, his commitment to pacifism, and the open and peaceful nature of his act. It was rejected by the trial judge who stated that he was of the view that "this is not an appropriate case for the acceptance of a nolo contendere plea" and that it was denied "in the exercise of the court's discretion," and without any further statement of reasons (21a).

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals has decided important questions of Federal law which should be settled by this Court.

I.

Inasmuch as the duplicate notice of classification which petitioner burned was sent to him by his local board, in violation of Selective Service regulations, after he requested it for the stated purpose of symbolic burning, the action of the board constituted implied condonation, thus rendering his conviction in violation of due process under the principles of the *Raley-Cox* doctrine.

This case involves an important and unsettled question of criminal due process, quite apart from consideration of the constitutional applicability of the draft card burning prohibition to petitioner's actions. It is axiomatic that "the individual must have fair warning of what conduct the government intends to punish." Note, 78 YALE L.J. 1046, 1048 (1969). See *Cole* v. *Arkansas*, 333 U.S. 196 (1948); *DeJonge* v. *Oregon*, 299 U.S. 353, 362 (1937). In *Raley* v. *Ohio*, 360 U.S. 423 (1959), and *Cox* v. *Louisiana*, 379 U.S. 559 (1965), this Court established the principle that when one acts in a legally ambiguous situation, with the seeming tolerance or condonation of governmental authority, the due process clause protects him from being prosecuted for such action.[1]

[1] See *People* v. *Markowitz*, 18 N.Y.2d 953, 277 N.Y.S.2d 149 (1966) (conviction for unlicensed peddling reversed as violation of due process, citing *Cox*, where defendant alleged that he was

Petitioner urges that this case comes within the *Raley-Cox* principle since (1) at a time that the constitutionality of the newly-enacted statute was being subjected to serious question,[2] (2) when petitioner was a duly classified conscientious objector, (3) and concededly beyond the age of effective Selective Service liability, (4) he asked his local board to send him a new draft card for the stated purpose of burning it as a symbolic protest against the war, (5) the local board immediately obliged him without inquiry or warning, (6) notwithstanding the fact that a similar gesture which he attempted to make some years previously resulted in a specific warning by the Board of the legal consequences of non-possession.

Petitioner's argument is strongly buttressed by the fact that the local board did not comply with Selective Service Regulations in issuing him a new card without making the required investigation.

Under §1623.7 of the Selective Service Regulations a duplicate *may* be issued upon "the presentation of proof satisfactory to the local board" that the document "has been lost, destroyed, mislaid or stolen." The local board is specifically enjoined not to issue a duplicate in response to a letter "which does not present sufficient information

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told license was unnecessary); see also *People* v. *Donovan*, 53 Misc.2d 409, 279 N.Y.S.2d 404 (1967). Cf. *State* v. *White*, 237 Mo. 108, 140 S.W. 896 (1911) (reversing conviction of felon who registered to vote in violation of disqualification statute where election officials knowing his status allowed him to vote).

[2] Petitioner burned his card on March 24, 1966. The first appellate court decision upholding constitutionality was *United States* v. *Miller*, 367 F.2d 72 (2d Cir.) decided on Oct. 13, 1966. On April 10, 1967, the First Circuit held the statute unconstitutional. *O'Brien* v. *United States*, 376 F.2d 538, rev'd 391 U.S. 367 (1968).

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concerning the basis for the request. . . ." In such event, Section 1623.7 directs the local board to mail to the registrant an official selective service form designated "Request for Duplicate Registration Certificate or Notice of Classification (SSS Form No. 6)," and to instruct him that the form must be completed and returned to the local board.[3]

Thus, the statement by the trial court that the local board, in sending the duplicate card upon request, "only did what it was required to do . . . ," 297 F. Supp. at 342 (PA 8), is incorrect since the local board plainly did *not* do what it was required to do. The failure to follow regulations is a further violation of petitioner's right to due process. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Service* v. *Dulles*, 354 U.S. 363 (1957); see *Miller* v. *United States*, 388 F.2d 973 (9th Cir. 1967); *Murray* v. *Blatchford*, —— F. Supp. ——, 38 U.S.L.W. 2381 (D.R.I. Dec. 24, 1969).

The trial court attempted to distinguish *Raley* and *Cox* by a finding that "it is plain from the record in this case that Kiger was fully aware at the time he burned his draft card of the amended statute making such an act a crime. . . ." 297 F. Supp. at 342 (PA 8). But there is no requirement of ignorance of the *existence* of the penal

[3] A registrant, particularly one classified by his local board as a conscientious objector, who addressed such a letter to his board, might have reasonably expected that his letter would lead to some dialogue with the board. Indeed, one might expect that the normal reaction of a board concerned with the welfare of a registrant would be to attempt to discuss the problem with him and to dissuade him from any rash action. Cf. *Stoppelman* v. *United States*, 406 F.2d 127, 130 (1st Cir. 1969). ("Some thoughtful probing of appellant's views might either have caused appellant to change them or to change his intended course of conduct. . . .") But petitioner received neither a warning against infraction, nor an invitation to appear before the Board, nor even a letter urging him to think twice before acting. All that he got was a draft card suitable for burning.

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statute as a precondition for the application of the *Raley-Cox* doctrine. The constitutional right of a person charged with a crime to clear and unequivocal notice that his act is criminal may not be excused by "the speculation of the court below" that he "might have behaved the same way regardless of what the [Local Board] told [him]." *Raley* v. *Ohio*, 360 U.S. at 439.

Furthermore, although it was indeed clear that petitioner was aware of the newly-enacted statute, it is not at all clear that he was aware that it applied to him. In the light of his age and classification, his prior correspondence with the Board, and the uncertain status of the new law, he may have not unreasonably concluded that the Board's action signified that the law did *not* apply to him. A person is not guilty of a "wilful" crime if he acts in the honest but mistaken belief that his actions are lawful. *United States* v. *Murdock*, 290 U.S. 309 (1933).

This Court in *Raley* described the constitutionally objectionable government activity as "an indefensible sort of entrapment . . ." 360 U.S. at 426. It is not classical entrapment since there is no element of secrecy on the part of the government. Cf. *Sorrells* v. *United States*, 287 U.S. 435 (1932). But the essence of the wrongful action here, as in *Raley* and *Cox*, is simply that the consequence of governmental action was "the leading of a person to committing a violation of the law." *United States* v. *Sansone*, 385 F.2d 247, 251 (7th Cir. 1967).

In civil cases the government can be equitably estopped where it is aware of illegal practices but remains silent, and the party dealing with the Government "relied to its detriment on the Government's silence." *United States* v.

Hanna Nickel Smelting Company, 253 F. Supp. 784, 793 (D. Ore. 1966) aff'd 400 F.2d 944 (9th Cir. 1968).[4] In this case petitioner did not have to try to divine the meaning of governmental silence, as would have been the case, for example, if he asked a specific question and received no answer. Here there was an immediate answer, in the form of a draft card virtually by return mail, sent to him with the full imprimatur of the government.

When a citizen asks a govermental agency if a proposed course of action is legal, perhaps the agency has no responsibility to respond. But if it does respond, and its response appears to legitimate illegal conduct, then the due process clause forbids prosecution. See *People* v. *Markowitz,* 18 N.Y.2d 953, 277 N.Y.S.2d 149 (1966). If the citizen requests of the governmental agency the means with which to perform the questionable act, and the agency unhesitatingly obliges him without warning, the same principle of due process should apply *a fortiori.* Assume the case of a licensed physician authorized to dispense narcotic drugs upon issuance of his annual state license therefor. The physician advises the state authorities at the time he applies for his annual renewal that he disagrees with the statutory restrictions and intends, if his license is renewed, to dispense narcotics whenever he believes it professionally appropriate. Surely there is some obligation on the part of the authorities to either withhold the license, or to issue a warning, or to investigate. To simply issue the license, and then to prosecute, is offensive to the elemental notion of fairness which the due process clause seeks to safeguard.

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[4] For a well reasoned argument that *Raley* and *Cox* indicate the emergence of a doctrine of criminal estoppel, see Note, 78 YALE L.J. 1046 (1969). See also Note, 40 TUL. L. REV. 185 (1965).

This court should grant certiorari so that it can be decided whether a citizen who deals with a governmental agency concerning action which may be criminal always does so at his peril, or whether there are any circumstances where ambiguous governmental action will free him of the peril. "We should not derive criminal outlawry from some ambiguous implication." *United States* v. *Universal C. I. T. Credit Corp.*, 344 U.S. 218, 222 (1952); *United States* v. *Toussie*, 38 U.S.L.W. 4181, 4184 (U.S. Mar. 2, 1970).

II.

The decision of this Court in *United States* v. *O'Brien* merits reconsideration in the light of the substantial and serious criticism which has been directed at its constitutional soundness, as well as the importance of establishing more definitive guidelines to deal with cases involving symbolic expression.

In *United States* v. *O'Brien*, 391 U.S. 367 (1968), this Court rejected arguments that the hurried 1965 amendment, which made it a felony to "wilfully destroy" or "wilfully mutilate" one's selective service certificate, amounted to an abridgement of free speech in violation of the First Amendment. The Court held that, as applied to O'Brien, the punishment for draft card burning was not without a valid legislative purpose, 391 U.S. at 378-381. O'Brien's arguments that the statute abridged a long-established constitutional right to peaceful symbolic speech were rejected, 391 U.S. at 376, 378, 382, as were O'Brien's arguments that the statute must be held unconstitutional because of the clearly expressed Congressional purpose to punish draft card burners for their dissenting beliefs and symbolic acts, 391 U.S. at 382-386.

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Rarely has a Supreme Court decision met with such a universal reaction of disapproval as did the *O'Brien* case. Virtually every commentator, including some of great distinction, who has had occasion to note the decision, has criticized its constitutional soundness on a number of grounds. See Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975, 997-1002 (1968); Henkin, *Foreword: On Drawing Lines, The Supreme Court—1967 Term*, 82 HARV. L. REV. 63, 76-82 (1968); Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 THE SUPREME COURT REVIEW 1 (1968); Katz, *When a Nation Is at War—The Supreme Court in a Post-Utopian Era*, 23 RUTGERS L. REV. 1, 19-32 (1968); Rosen, *Civil Disobedience and Other Such Techniques: Law Making Through Law Breaking*, 37 GEO. WASH. L. REV. 435, 441, 447 (1969); Velvel, *Protecting Civil Disobedience Under the First Amendment*, 37 GEO. WASH. L. REV. 464 (1969); Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1098-1105 (1968); Note, 37 GEO. WASH. L. REV. 596 (1969); Note, 14 How. L. J. 186 (1968); Note, 20 SYR. L. REV. 98 (1968); Note, 6 SAN DIEGO L. REV. 81 (1969). See, also, Velvel, *Freedom of Speech and the Draft-Card Burning Cases*, 16 KANS. L. REV. 149 (1968); Rachlin, *Draft Cards and Burning the Constitution*, 32 BKLYN. L. REV. 334 (1966); but cf. Forkosch, *Draft Card Burning—Effectuation and Constitutionality of the 1965 Amendment*, 32 BKLYN. L. REV. 303 (1966); Note, 3 PORTIA L. J. 52 (1967).

Six Supreme Court justices joined in the majority decision in *O'Brien*. Mr. Justice Harlan concurred in a separate opinion, 391 U.S. at 388. Mr. Justice Douglas dissented on the grounds that the Court should consider the

constitutionality of peacetime conscription, 391 U.S. at 389.[5] Mr. Justice Marshall did not participate, 391 U.S. at 386.[6]

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[5] Last term, in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), this Court unanimously held unconstitutional the Ohio criminal syndicalism law, thereby expressly overruling *Whitney* v. *California*, 274 U.S. 357 (1927). Mr. Justice Douglas, in his concurring opinion in *Brandenburg*, argued that the same free speech doctrine as that which the Court applied to invalidate the Ohio criminal syndicalism law should have led to a similar decision of unconstitutionality in *O'Brien*. Mr. Justice Douglas wrote at 395 U.S. 450, 454-456:

> "Action is often a method of expression and within the protection of the First Amendment.
>
> "Suppose one tears up his own copy of the Constitution in eloquent protest to a decision of this Court. May he be indicted?
>
> "Suppose one rips his own Bible to shreds to celebrate his departure from one 'faith' and his embrace of atheism. May he be indicted?
>
> "Last Term the Court held in *United States* v. *O'Brien*, 391 U.S. 367, 382, that a registrant under Selective Service who burned his draft card in protest of the war in Vietnam could be prosecuted. The First Amendment was tendered as a defense and rejected, the Court saying:
>
> > 'The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.' 391 U.S., at 377-378.
>
> "But O'Brien was not prosecuted for not having his draft card available when asked for by a federal agent. He was indicted, tried, and convicted for burning the card. And this Court's affirmance of that conviction was not, with all respect, consistent with the First Amendment.
>
> "The act of praying often involves body posture and movement as well as utterances. It is nonetheless protected by the Free Exercise Clause. Picketing, as we have said on numerous occasions, is 'free speech plus.' See *Bakery Drivers Local* v. *Wohl*, 315 U.S. 769, 775 (DOUGLAS, J., concurring); *Giboney* v. *Empire Storage Co.*, 336 U.S. 490, 501; *Hughes* v. *Superior Court*, 339 U.S. 460, 465; *Labor Board* v. *Fruit Packers*, 377 U.S. 58, 77 (BLACK, J., concurring), and 377 U.S., at 93

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Nothing short of a review of the entire corpus of scholarly writings critical of *O'Brien* can adequately picture the many grounds for concern with its premises, reasoning, holding, and implications. Included are the court's unpersuasive citation of precedent;[7] the inadequate definition

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(HARLAN, J., dissenting); *Cox* v. *Louisiana*, 379 U.S. 559, 578 (opinion of BLACK, J.); *Food Employees* v. *Logan Plaza*, 391 U.S. 308, 326 (DOUGLAS, J., concurring). That means that it can be regulated when it comes to the 'plus' or 'action' side of the protest. It can be regulated as to the number of pickets and the place and hours (see *Cox* v. *Louisiana, supra*), because traffic and other community problems would otherwise suffer.

"But none of these considerations are implicated in the symbolic protest of the Vietnam war in the burning of a draft card."

[6] Mr. Justice Marshall's majority opinion in *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza*, 391 U.S. 308 (1968), decided one week prior to *O'Brien*, expresses the "speech-nonspeech" relationship in terms much more sympathetic to the free speech interest than the majority opinion in *O'Brien*:

"[N]o case decided by this Court can be found to support the proposition that the nonspeech aspects of peaceful picketing are so great as to render the provisions of the First Amendment inapplicable to it altogether.

* * * * *

"As we observed earlier, the mere fact that speech is accompanied by conduct does not mean that the speech can be suppressed under the guise of prohibiting the conduct . . . . [T]his Court stated many years ago, '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' Schneider v. State, 308 U.S. 147, 163 . . . ." 391 U.S. at 314, 323-324. See Prof. Henkin's comment on this inconsistency at 82 HARV. L. REV. 63, 79, n. 53.

[7] Referring to this Court's citation in *O'Brien*, 391 U.S. at 376-377, of its prior decisions in *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 464 (1958); *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960); and *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945), as distinguishable from *O'Brien*, Prof. Henkin observes: "The cases cited in *O'Brien* do not explain these distinctions for they are all cases that refused to give effect to

and application of the First Amendment balancing test;[8] the failure to analyze the relationship between the speech and the conduct components of draft-card burning and to perceive that the *predominant* element is expression not action;[9] the corresponding failure to recognize that the

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them." 82 HARV. L. REV. at 77. Indeed, all five of the cited precedents uphold the free expression interest over the asserted governmental interest, and the *O'Brien* opinion does not explain how these precedents lead the Court to a different result.

[8] Prof. Emerson criticizes the Court for balancing "the general interest in national security against the interest in freedom of expression," rather than "the government's interest in preventing non-possession *by burning* (not non-possession in general) as against freedom of expression." 116 U. PA. L. REV. at 998, n. 73. "This degree of protection for expression falls far short of even that afforded by the balancing test." *Id.* at 1000. *Accord*: "[I]n spite of a relatively unimportant government interest and a substantial speech interest, the Court found the 1965 amendment valid. To do so, it in effect ignored the balancing process that has long been the controlling first amendment test." Note, 37 GEO. WASH. L. REV. at 603. Prof. Alfange writes: "If there were no competing interest against which it was to be measured, surely a slight government interest would be enough to justify regulation or prohibition of the conduct. Yet the absence of any attempt at comparison in the Court's opinion is striking. . . . [R]esolution of the question must turn on a comparison, or balancing, of the competing interests —and this is precisely what the Supreme Court avoided." 1968 THE SUPREME COURT REVIEW at 23, 25-26.

[9] "Conduct and speech are thus treated as discrete and entirely separable entities. Such a conceptual division may facilitate reasoning, but it fails altogether to correspond with reality. Moreover, it fails to square with several decisions of the Court that have conceded the expressive quality of certain forms of symbolic conduct . . . ." Alfange, *supra*, 1968 THE SUPREME COURT REVIEW at 24. "The burning of a draft card is, of course, conduct that involves both expression and action. Yet it seems quite clear that the predominant element in such conduct is expression (opposition to the draft) rather than action (destruction of a piece of cardboard). The registrant is not concerned with secret or inadvertent burning of his draft card, involving no communication with other persons. The main feature, for him, is the public nature of the burning, through which he expresses to the community his ideas and feelings about the war and the draft." Emerson, *supra*, 116 U. PA. L. REV. at 1000.

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statute was *primarily* directed at the speech element, not the conduct element;[10] the totally uncritical acceptance of valid legislative purpose, notwithstanding the overwhelming impact of unanimously contrary legislative history;[11] the thorough insubstantiality, and almost fancifulness, of the

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[10] Prof. Emerson points out: "Moreover, it is apparent that governmental control was directed at the expression element of draft card burning, not at the action element. The destruction of a small bit of paper, the action element involved, is not normally punished by five years in prison . . . . Certainly it would make no sense for Congress to punish loss of possession *by reason of burning*, rather than loss of possession generally. What Congress did, in short, was simply to punish a form of expressing opposition to the draft; the effect of the amendment in improving the operation of the draft system was trivial and superfluous." 116 U. PA. L. REV. at 1000-1001. Prof. Alfange adds the following analysis: "The prohibition against knowing destruction or mutilation, however, is manifestly enforceable only against those who destroy their cards in the presence of witnesses or those who confess. Against others, *scienter* could not be proved. The law, in practice, can thus have an effect only upon the handful of dissenters who destroy their cards publicly or who announce that they have destroyed them. But if the reasons asserted by the government as the basis for the law are correct, the government's interest goes far beyond the actions of the dissenters; it pertains to all registrants. The fact that Congress chose to protect this interest by employing a law that has practical application only against draft-card burners, when, at the same time, no meaningful steps were looked upon as necessary to insure preservation of draft cards by the vast majority of individuals, is a persuasive indication that the burden imposed by the amendment upon freedom of expression is not an important step in the protection of the government interest. Since the constitutional validity of a law such as this, which suppresses symbolic conduct, depends in large part upon its importance for the protection of the interest it is said to serve, the fact that it cannot effectively serve that interest is cogent evidence of its unconstitutionality." 1968 THE SUPREME COURT REVIEW at 45.

[11] See all of the critical commentary *passim*, but especially Prof. Alfange's detailed discussion of "Legislative Motives and the Constitutionality of Statutes," 1968 THE SUPREME COURT REVIEW at 27-28. The author of the Note at 37 GEO. WASH. L. REV. 596 (1969),

legislative justifications catalogued by the Court;[12] and the wooden distinctions assumed between orthodox modes of expression and symbolic speech, which failed to perceive the essential nature of the communication process.[13]

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discovered a portion of the legislative history which had not been noted in the previous discussions of draft card burning:

"In explaining the purpose of the legislation to the full House Armed Services Committee, the Committee's Chief Counsel stated, 'Now this is the answer, of course, to this attempted mass destruction of draft cards. These bums that are going around the country burning draft cards while people are dying in Viet Nam have brought about this type of action on the part of the chairman [Hon. L. Mendel Rivers].' He also stated, 'If we used the words . . . knowingly mutilates . . . it is easier to convict an individual who puts his card into a fire purposely at a mass demonstration, or destroys his draft card in the presence of others.' House Armed Services Comm., *Full Comm. Consideration of H. R.* 10306, 89th Cong., 1st Sess., No. 23, at 3130 (1965)." 37 GEO. WASH. L. REV. 596, 600, n. 34.

Prof. Alfange concludes that the Court " . . . coyly chose in this case to accept the law uncritically on its face and to avoid recognition of the manifest congressional purpose." 1968 THE SUPREME COURT REVIEW at 52.

[12] See Prof. Velvel's analysis at 37 GEO. WASH. L. REV. at 469-472, and Prof. Alfange's analysis at 1968 THE SUP. CT. REV. at 42-44 (" . . . where a law is enacted with foreknowledge that it would have the effect of suppressing a form of dissent, it would not be unreasonable to demand that its utility be more than merely conjectural." *Id.* at 42). See also Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1102 (1968). It is hard to disagree with Prof. Alfange's conclusion that "this is a rationalization conceived after the fact of enactment rather than a statement of the considerations underlying the amendment's passage." 1968 THE SUP. CT. REV. at 27.

[13] See citations to Prof. Emerson's article, *supra*, and see particularly the close analysis of free speech and language theory by the author of the Note at 68 COLUM. L. REV. 1091, including references to McLuhan, *id.* at 1108; Butler ("Whenever two living beings have conveyed and received ideas, there has been language, whether looks or gestures or words spoken or written have been the vehicle by means of which the ideas have travelled." *Id.* at 1109); and Milton ("Whatever thing we hear or see, sitting, walking, traveling, or conversing may be fitly called our book, and is of the same effect that writings are. . . ." *Id.* at 1106).

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Petitioner respectfully urges that a consideration of the virtually unanimous scholarly criticism of the *O'Brien* decision in itself is sufficient justification for granting certiorari in this case.[14] Cases raising questions of symbolic speech are coming to this Court with increasing frequency. See *Tinker* v. *Des Moines*, 393 U.S. 503 (1969); *Street* v. *New York*, 394 U.S. 593 (1969); *Cowgill* v. *California*, —— U.S. ——, 24 L.ed.2d 590 (1970). Some of the Justices who voted with the *O'Brien* majority have intimated differing views concerning the scope of the constitutional holding in that case. Compare Mr. Justice Harlan, writing for the Court in *Street* v. *New York, supra*, 394 U.S. at 594, with Mr. Justice Fortas, dissenting, 394 U.S. at 599. In *Cowgill* v. *California, supra*, Mr. Justice Harlan and Mr. Justice Brennan, specifically observed that in *O'Brien* this Court took "judicial notice of the symbolic significance of draft card-burning which became a recognized way of protesting the draft and American involvement in Vietnam," 24 L.ed. 2d at 591. At the same time, in the apparent view of Justices Harlan and Brennan, there are limits to the *O'Brien* holding, since "The Court has, as yet, not established a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitutionally protected interest in freedom of expression." 24 L.ed.2d at 590-591.

A grant of certiorari in this case would provide an opportunity to reconsider the *O'Brien* holding in the light of the critical commentary, and to provide such further re-

[14] "Even in a day when the law reviews are much cited but not often heeded, it may still serve a purpose to hold up to the Court a mirror that emphasizes its warts." Henkin, *supra*, 82 HARV. L. REV. at 63.

finements as may be necessary for the constitutionally tolerable regulation of symbolic speech. This Court has always had the view, Chief Justice Warren has stated, "that in constitutional cases *stare decisis* is not absolute, that constitutional questions are always open for examination . . . ." Lewis, *A Talk With Warren on Crime, the Court, the Country,* The New York Times Magazine, October 19, 1969, pp. 34, 128.[15]

III.

The statute may not be constitutionally applied to a registrant who is beyond the age of any effective selective service liability.

In addition to reconsideration of *O'Brien,* a further reason for granting certiorari is to determine if there is constitutional power to punish a draft card-burner who is beyond the age of any effective selective service liability. The government conceded and the trial court acknowledged that petitioner, who was a classified conscientious objector past the age of 26, had virtually no likelihood of being drafted. 297 F. Supp. at 342-343 (24a, PA 11). Yet the trial court held that since "the Selective Service System was required to keep track of him until he reached 35 . . . the purposes served by the statute, as found in *O'Brien,* apply to Kiger."[16] 297 F. Supp. at 343.

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[15] For a careful study of the ninety times that this Court has reversed itself between 1790 and 1959, see Ulmer, *An Empirical Analysis of Selected Aspects of Lawmaking of the United States Supreme Court,* 8 J. OF PUB. L. 414, 418-423 (1959).

[16] An analysis of the four legislative justifications itemized in the *O'Brien* opinion, 391 U.S. at 379, even without the critical

It is significant, therefore, that the *O'Brien* opinion contains a passage which suggests that its holding may be of limited application. After noting the existence of "constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end . . . ", 391 U.S. at 377, the opinion then states:

> "Pursuant to this power, Congress may establish a system of registration for individuals *liable* for training and service, and may require *such* individuals *within reason* to cooperate in the registration system." *Ibid.* (Emphasis added.)

This key sentence of the opinion appears to acknowledge that notwithstanding the breadth of constitutional power to raise and support armies, the power to register and to classify does not reach individuals who are *not* liable for training and service, and that, in any event, only regulations which are "within reason" are constitutionally permissible. Of course, the war power is not sacrosanct, and "cannot be invoked as a talismanic incantation to support any exercise of Congressional power that can be brought within its ambit." *United States* v. *Robel,* 389 U.S. 258, 263 (1967). See *Galvan* v. *Press,* 347 U.S. 522, 530 (1954); *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952); *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144 (1963); *Wolff* v. *Selective Service Local Board #16,* 372 F.2d 817 (2d Cir. 1967).

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commentary, see note 12, *supra,* makes it plain that whatever other governmental purposes may be served by penalization of draft card burning, the statute in no way affects the ability of the Selective Service System "to keep track of" any of its registrants, whether age 18, age 26, or age 35.

It is one thing to hold David O'Brien (who was classified I-A as available for immediate induction) to be constitutionally subject to the statute. It is quite another thing, however, to urge that the Congressional power to raise armies goes so far as to allow the constitutionally permissible punishment of persons no longer draft eligible who burn draft cards as an expression of symbolic dissent. Clearly, there is nothing in the Supreme Court's rationale in the *O'Brien* case which would allow the prosecution of a draft card burner who is over the age of 35. Yet, the statute, by its terms, applies to all persons, women as well as men, of draft age, below draft age, and beyond draft age, without any limitation.

Surely there are constitutional limits to the power to regiment the citizenry by compelling all persons to retain in their permanent possession Selective Service certificates, income tax returns, identification cards, or any other government-issued documents. Certiorari should be granted so that this still open question of the scope of Federal power can be settled.

IV.

Since the guarantee of free speech protects the right to compete effectively in the marketplace of ideas—the right to communicate with a significant audience—and since the facts of this case show that petitioner burned his draft card because of his inability to otherwise have access to the media, the conviction for burning his draft card violated his rights under the First Amendment.

Incidental limitations on First Amendment activity are justified where the state interest in the regulation is substantial. *O'Brien* v. *United States,* 391 U.S. 367 (1968). However, Justice Harlan said in his concurring opinion:

> "I wish to make explicit my understanding that this passage does not foreclose consideration of First Amendment claims in those rare instances when an 'incidental' restriction upon expression, imposed by a regulation which furthers an 'important or substantial' governmental interest and satisfied the Court's other criteria, in practice has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate. This is not such a case, since O'Brien manifestly could have conveyed his message in many ways other than by burning his draft card." *Id.* at 388-89.

Thus, Justice Harlan invited a showing that a draft card burner could not have reached a "significant audience" by more conventional means of protest. Justice Harlan went to the heart of what the First Amendment means. The guarantee of freedom of speech insures not only the right

to speak one's mind, but the right to "communicate," the right to reach a "significant audience."

> "Liberty of circulating is as essential . . . as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Ex parte Jackson*, 96 U.S. 727, 733 (1877).

Justice Harlan perhaps properly assumed that O'Brien could have conveyed his message to a significant audience in ways other than burning his draft card. No evidence was offered to the contrary. But Peter Kiger offered that evidence at trial. Despite the conclusory statement of the trial court that he "had available lawful means to convey his message," 297 F. Supp. at 344, he could not have reached the "significant audience" allowed by the broadcasting media and guaranteed by the First Amendment without resort to such dramatic form of protest. As Mr. Justice Douglas has observed:

> "Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable. . . ." *Adderley* v. *Florida*, 385 U.S. 39, 49-51 (1966) (Douglas, J., dissenting).

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A. *Kiger Had Been Unable to Reach a Significant Audience Through the Traditional Forms of Protest*

How people with "a novel point of view" are denied access to a "significant audience," and thus denied the possibility of having an impact on government policy, is illustrated by the situation of Peter Kiger, and revealed in the record of this case.

A pacifist who had served a prison term because he could not in conscience perform civilian alternative service, Kiger had publicly and non-violently expressed his opposition to the war in Vietnam on numerous occasions. He leafleted and picketed constantly. He gave speeches and participated in a weekly vigil in Times Square. His audience during those times numbered in the hundreds or at the most a few thousands (79a). The Administration, meanwhile, with its regular access to the mass media, defended the war to audiences of many millions. It is true that Peter Kiger was free to express his views, to oppose the war openly and vigorously, but in a marketplace enlarged by the media to tens of millions, he reached only thousands. In no sense did his speech effectively reach the full marketplace; in no sense, therefore, were his views able to effectively compete in the marketplace.

In an attempt to reach larger audiences, he and other anti-war activists called press conferences to announce their picketing and their vigils. But these demonstrations were common and uneventful; they were not newsworthy and, therefore, were not communicated through the media to the marketplace. It was of course not necessary for the Administration to do anything newsworthy to command coverage. Its routine announcements about the war became immediate headlines for millions to read.

Then Kiger and three colleagues sent out a short press release stating that they would burn their draft cards in the office of the Committee for Non-Violent Action. The next day, representatives of every major news media crowded into a small room to listen to Peter Kiger state his moral opposition to the war and to watch him burn his Notice of Classification. All the media gave the story prominent coverage; the total audience was in the millions. By means wholly peaceful, wholly non-violent, destructive only of a small card belonging to him, Kiger had reached Justice Harlan's "significant audience."

What had happened was—according to a communications expert who testified—that Peter Kiger, who himself was of no news interest, whose opinions by themselves could command no media coverage, had done something novel and dramatic, and thus newsworthy (63a, 64a). One reporter, who was there and who also testified, said he would not have been assigned to cover the story had Kiger merely announced that he would read a statement opposing the war.[17]

B. *Competition in the Marketplace of Ideas Depends on the Effective Opportunity to Reach a Significant Audience*

The problem posed by this case is not new. The Holmesian analysis demanded not only that ideas be expressed

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[17] "By the bizarre and unsettling nature of this technique the demonstrator hopes to arrest and divert attention long enough to compel the public to ponder his message. But attention-getting devices so abound in the modern world that new ones soon become tiresome. The dissenter must look for ever more unsettling assaults on the mass mind if he is to have continuing impact." Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1647 (1967). See Barron, *An Emerging Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487, 491, n. 16 (1969).

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but that they compete. As a result, the Court has sought to insure a competition in ideas by guaranteeing access to the marketplace, or, in other words, by upholding the right to *publicly* express one's views. Thus, in *Hague* v. *CIO*, 307 U.S. 496, 515 (1939), this Court noted and upheld the historic use of parks and streets "for purposes of assembly, communicating thoughts between citizens, and discussing public questions." The concern there stated for a place where ideas could have public exposure and compete for acceptance was re-affirmed later that term when the Court held that "the streets are natural and proper places for the dissemination of information and opinion . . ." *Schneider* v. *State*, 308 U.S. 147, 163 (1939). But the Court went one step further in that case, holding that the First Amendment guaranteed not only a public place in which to communicate but the right to use effective means of communication. So pamphlets were protected because they were "most effective instruments in the dissemination of opinion." *Id.* at 164. And several years later the right to use loudspeakers was upheld because they are "indispensable instruments of effective public speech. . . . It is the way people are reached." *Saia* v. *New York*, 334 U.S. 558, 561 (1948).

Recently, this Court, in striking down an Alabama ban on election day campaigning, observed that election day was the only time when "last-minute" charges could be "effectively answered." *Mills* v. *Alabama*, 384 U.S. 214 (1966). And in voiding an injunction against picketing in a private shopping center, this Court held that the injunction would preclude the picketers from communicating their message to the store's patrons. *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S.

308 (1968). See also, *Wolin* v. *Port of New York Authority*, 268 F. Supp. 855, 859, aff'd 392 F.2d 83 (2d Cir. 1968) (public places secured for the exercise of First Amendment rights "because they are usually locations where the ears of large numbers of fellow citizens can most effectively be reached"); *Zucker* v. *Panitz*, 299 F. Supp. 102, 105 (S.D. N.Y. 1969) (prohibition against placing anti-war advertisement in school newspaper voided because "[it] is patently unfair in the light of the free speech doctrine to close to the students the forum which they deem effective to present their ideas").

Not just the right to speak, then, but the right to *effectively* communicate, to have one's views reach significant numbers of people, to insure "free discussion of governmental affairs," *Mills* v. *Alabama, supra* at 218, so that "government may be responsive to the will of the people," *Stromberg* v. *California*, 283 U.S. 359, 368 (1931) —these are the concerns of the First Amendment.

That is the theory, and that, we submit, is what Justice Holmes envisioned. But just as the laissez-faire economic theory which it reflected broke down when the marketplace of goods and services became dominated by concentrations of economic power, so the political theory must now take into account the dominance of the marketplace of ideas by the electronic media. Just as there was no effective competition between the small retail grocer and the great grocery chains, so there is no competition between ideas carried on leaflets and picket signs and ideas transmitted to millions by radio and television.

Nowhere is this disparity of access so conspicuous as with regard to opposition to the war in Vietnam. The

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effort to arouse opposition to the war has been waged by individual citizens against a government policy which is defended daily to millions by Administration spokesmen in headlines and news shows. The pictures of war appear in newspapers and flash across television screens, and condition the country to accept war as routine.

It was in the context of this massive, relentless, emotional appeal from the Government for support of its war, an appeal which used the visual images of war and the symbol of the Presidency to persuade its nationwide audience, that a dissenter took the most available and most innocuous symbol of the war—a draft card—and burned it before the representatives of the national news media. For the first time in his life, Peter Kiger's views had reached a significant audience—had competed in the same marketplace—as those of his Government.

C. *The Ability to Reach a Significant Audience Depends on Gaining Access to the Mass Media*

If this purpose of the First Amendment—the competition of ideas—is to be achieved today, novel forms of protest, which allow the opportunity to reach a significant audience through the mass media, must enjoy the same protection earlier afforded speeches in public parks, leafleting, loudspeakers, and picketing in shopping centers.

It was the recognition of this fact—that, in the electronic age, an opportunity to reach the mass media audience is a necessary concomitant of the First Amendment—which underlay last term's decision in *Red Lion Broadcasting Company* v. *Federal Communications Commission*, 395 U.S. 367 (1969). Expressing concern for the legitimate claims of those unable without governmental assistance to gain

access to broadcast frequencies for expression of their views, the Court upheld the FCC "fairness doctrine," which requires a broadcaster to give fair coverage to both sides of controversial issues and to give one subjected to a personal attack an opportunity to reply. To the claim of the broadcasters that the requirement abridged their First Amendment rights, this Court held that

> "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . ." *Id.* at 390.

Thus, this Court re-affirmed its adherence to the "marketplace" concept, but brought it into the mass communications era by acknowledging that "the people as a whole" must have access to broadcasting facilities in order to effectively compete in the marketplace.

The learning of the First Amendment cases through *Red Lion Broadcasting* is that Kiger had a right protected by the First Amendment to have his ideas compete effectively. He had a right, absent a strong interest of the state to the contrary, to reach a "significant audience." As this Court has said:

> "The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention." *Kovacs* v. *Cooper,* 336 U.S. 77, 87 (1949).

Thus, the law prohibiting draft card burning, far from having an "incidental" effect on his First Amendment

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rights, as assumed by *O'Brien,* substantially deprived petitioner of those rights. Under these circumstances the easy assumption by the Court that the prohibition was justified must be re-examined. Quite simply, an interest of the state which outweighs an incidental limitation on First Amendment rights may well not outweigh what amounts to a total deprivation of those rights. The traditional balancing test employed by this Court requires no less.

V.

The District Court abused its discretion in refusing to accept a plea of *nolo contendere.*

Prior to trial, Kiger offered to enter a plea of *nolo contendere.* Rule 11 of the Federal Rules of Criminal Procedure requires the consent of the court before a defendant may so plead. The court rejected the plea without explanation (21a). Petitioner contends that a proffered plea of *nolo contendere* may not be rejected arbitrarily. Under the circumstances of this case, we urge that the trial court abused its discretion in rejecting the plea.

The *nolo* plea does have legal and practical effects which differ from a finding of guilty or a plea of guilty. These differences are significant in this case. A *nolo* plea, unlike a finding of guilt, may not be used to impeach the defendant's testimony in a subsequent civil or criminal action. *Mickler* v. *Fahs,* 243 F.2d 515 (5th Cir. 1957); *Piassick* v. *United States,* 253 F.2d 658 (5th Cir. 1958).[18] Of greater moment, however, to petitioner (and to other young men

[18] This is obviously of great importance to petitioner whose lifelong pacifist acitvities have resulted in a number of court appearances.

who find themselves in conscientious opposition to the war and the draft), a *nolo* plea carries with it somewhat less of the public obloquy and dishonor that accompanies a conviction after trial or upon a guilty plea.

Federal courts have rarely articulated guidelines for determining when a *nolo* plea should be accepted or rejected, although the general proposition was advanced in *United States* v. *Jones*, 119 F. Supp. 288, 290 (S.D. Calif. 1954), that, "in the absence of some reason why a defendant should not have the benefit of the plea, the Court will ordinarily allow it to be entered." Other courts have sought more specific grounds for its acceptance, and have generally looked to the character of the defendant and the nature of the crime. See, e.g., *United States* v. *Chin Doong Art*, 193 F. Supp. 820, 822 (E.D.N.Y. 1961); *United States* v. *Engelhard-Hanovia, Inc.*, 252 F. Supp. 605 (S.D.N.Y. 1964); *United States* v. *Standard Ultramarine and Color Co.*, 137 F. Supp. 167 (S.D.N.Y. 1955).

In the light of such considerations, the record demonstrates that Peter Kiger qualifies pre-eminently for the acceptance of a *nolo* plea. His life has been a model of constructive achievement and commitment to the ideals of peace and non-violence. Raised as a Quaker, he applied for and received from his local board status as a conscientious objector and was ordered to report for civilian alternative services. Unable to reconcile compulsory service with his conscientious objector beliefs, he refused to report, pleaded guilty to the charges brought against him, and served a year in prison at the Springfield, Missouri Medical Center for Federal Prisoners (22a). As a condition of probation, he then worked for a year as an orderly in the Henry County Hospital in New Castle, Indiana. Peter

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Kiger has since led a life that has continued his earlier commitment, working for the past four years in the offices of two pacifist organizations, the War Resisters League and the Committee for Non-Violent Action. During that time, he has been almost singularly pre-occupied with promoting the cause of peace and non-violence (53a-54a). Without exception, his activities in that regard have been wholly non-violent.

The act which led to this conviction, the burning of his draft card, was symbolic not only of his opposition to war, but also of his commitment to principles of non-violent protest.

Considerations such as deterrence may be properly reflected in a sentence, but should not weigh in the decision to accept or reject a *nolo* plea. See, e.g., *United States* v. *Safeway Stores,* 20 F.R.D. 451 (N.D. Tex. 1951); *United States* v. *Cigarette Merchandisers Association,* 136 F. Supp. 212 (S.D.N.Y. 1955). The plea of *nolo contendere* is the singularly appropriate mechanism for courts to recognize that certain defendants come before them acknowledging their legal guilt while maintaining their moral innocence.

When one views the kinds of crimes for which *nolo* pleas have been accepted, crimes motivated by desire for money and power and revenge, crimes committed by violence, others with the knowledge that thousands of innocent persons were being robbed, crimes, according to an annotation at 89 A.L.R.2d 540, 560-62, which include arson, assault, burglary, sale of narcotics, embezzlement, espionage, extortion, rape, kidnapping and murder—in such light the nature of the crime of which Peter Kiger was accused stands apart in proper perspective as a selfless act motivated by conscience and principle.

Despite the absence of standards governing acceptance or rejection of the plea, the trial court's discretion was not unlimited. To reject it here constituted an abuse of discretion. See *N.L.R.B.* v. *Guernsey-Muskingum Electric Co-Operative, Inc.*, 285 F.2d 8 (6th Cir. 1960).[19]

The record in this case is devoid of any justification for rejecting the plea. This Court should grant review so as to establish some limitation on the authority of lower courts to reject pleas of *nolo contendere*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March, 1970

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[19] Although petitioner's counsel have found no case in which a court's refusal to accept a *nolo* plea has been grounds for reversal, the possibility was suggested in *Mason* v. *United States*, 250 F.2d 704, 706 (10th Cir. 1957).

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 436—September Term, 1969.

(Argued January 14, 1970 Decided January 26, 1970.)

Docket No. 33689

UNITED STATES OF AMERICA,

Appellee,

—v.—

PETER NIVEN KIGER,

Appellant.

Before:

MEDINA, WATERMAN and SMITH,

Circuit Judges.

Appellant was convicted below, United States District Court for the Southern District of New York, Bryan, *J.*, sitting without jury, of having violated 50 App. U.S.C. §462(b)(3). Opinion below reported at 297 F. Supp. 339 (1969). Conviction affirmed.

CHARLES B. UPDIKE, James D. Zirin, Paul B. Galvani, Asst. United States Attorneys, Robert M. Morgenthau, United States Attorney, *for Appellee.*

MARVIN M. KARPATKIN, Alan H. Levine, New York City, *for Appellant.*

PER CURIAM:

We affirm the conviction below on the opinion below, reported in 297 F. Supp. 339 (SDNY 1969) and do so upon the authority binding upon this court, *United States* v. *O'Brien,* 391 U.S. 367 (1968). And see *United States* v. *Miller,* 367 F.2d 72 (2 Cir. 1966), *cert. denied,* 386 U.S. 911 (1967), *rehearing denied,* 392 U.S. 917 (1968). With reference to the claim that the judge below abused his discretion in declining to accept the proffered offer of a plea of *nolo contendere,* we discover no reason to interfere with this decision of the trial judge. By refusing to accept the plea after the distribution and receipt of memoranda relative thereto, the judge required the Government to prove beyond a reasonable doubt each and every allegation of the indictment.

Opinion of the United States District Court for the Southern District of New York

No. 66 Cr. 452.

United States District Court

S. D. New York.

March 13, 1969.

UNITED STATES OF AMERICA,

—v.—

PETER NIVEN KIGER.

Robert M. Morgenthau, U. S. Atty., for the Southern District of New York, for the United States. Charles B. Updike, John R. Robinson, Asst. U. S. Attys., of counsel.

Marvin M. Karpatkin, Alan H. Levine, New York City, for defendant.

OPINION

FREDERICK VAN PELT BRYAN, District Judge:

Defendant Peter Niven Kiger was tried before me without a jury on an indictment charging him with knowingly destroying and mutilating his Selective Service Notice of Classification certificate in violation of § 462(b) (3) of the Universal Military Training and Service Act of 1948, as

amended, 50 App.U.S.C. § 462(b) (3). At the conclusion of the trial, decision was reserved. This section of the Universal Military Training and Service Act of 1948, as amended in 1965, provides that a crime is committed by "any person * * * who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes" any certificate issued pursuant to the provisions of the Universal Military Training and Service Act and the rules and regulations and directions made pursuant thereto. A Notice of Classification (SS Form 110) is such a certificate. 32 C.F.R. § 1623.4.

The evidence adduced at trial is for all practical purposes undisputed. It establishes beyond a reasonable doubt that on March 24, 1966, at the office of the Committee for Non-violent Action, 5 Beekman Place, New York City, Kiger burned his Notice of Classification[1] and that he did so knowingly and wilfully. The only questions in the case relate to the defenses raised by Kiger.

Kiger urges that he cannot be found guilty of a violation of § 462(b), as charged, for three reasons. He contends first, that there was "implied condonation" by his Local Board of his conduct in thus burning his draft card which would render a conviction for such conduct a denial of due process; second, that he was ineligible for the draft when he burned his card and therefore under the balancing test of United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), interference with his First Amendment rights of symbolic free speech is no longer justified; and third, that the act of burning his draft card was a

[1] The card burned by Kiger was a duplicate of his Notice of Classification. It was the only duplicate card ever issued to him and he no longer had his original Notice of Classification in his possession.

necessary means of obtaining access to the mass media for the expression of his views and was thus constitutionally protected by the First Amendment.

I

In January, 1966, while Kiger was classified I-O (Conscientious Objector), he wrote a letter to his Local Board in Indiana, reading in pertinent part as follows:

> "Please send me a new classification card (I-Y I believe). I do not know the whereabouts of the one which you sent to my home in Dunreith, Ind. in 1963; and I wish to burn one in sympathy with other people who have done so."

The Local Board then prepared a Notice of Classification card labeled "Duplicate", dated January 13, 1966, reflecting Kiger's current I-O classification rather than the I-Y classification in which he apparently thought himself placed. The duplicate card was mailed to Kiger on the same day without any accompanying letter or other communication. There was no further communication of any kind from the Selective Service or any of its representatives with reference to Kiger's letter or his statement that he intended to burn his card up to March 24, 1966, when the burning of the duplicate card took place.

Kiger contends that the action of the Local Board in sending him the duplicate card without any comment on his statement that he wished to burn it constituted "implied condonation" of his conduct in burning the card, which is tantamount to entrapment. He emphasizes the contrast between this procedure and the action taken by the Local Board in 1961, when he attempted to return his draft card

as "part of a protest against preparations for war by the United States Government and other governments and countries", and stated he was willing to face up to the penalties for such illegal acts. At that time the Board advised him that he must carry his registration and classification certificates so as not to be in violation of law.

He also argues that, since the constitutionality of the 1965 amendment to the Universal Military Training and Service Act, which made knowing destruction or mutilation of a draft card a crime, had not yet been passed on by any appellate court, the validity of the statute was then "uncertain". He urges that it follows from this that the Local Board's act of providing the duplicate card without comment, knowing he wished to burn it, implied that it thought his contemplated conduct was constitutionally protected.

Kiger relies principally on Raley v. Ohio, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959), and Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), to support this defense. These cases are clearly distinguishable and defendant's reliance on them is misplaced.

In *Raley*, the defendants-appellants, claiming the privilege against self-incrimination granted by the Ohio Constitution, had refused to answer questions propounded by the Ohio Un-American Activities Commission. They were informed by the Commission that they had a right to rely on the privilege. Nevertheless, they were convicted by the state courts for contempt for refusing to answer the questions.

The Ohio Supreme Court affirmed the convictions. It held that defendants were presumed to know the Ohio law to the effect that the Ohio immunity statute deprived them

of the protection of the privilege against self-incrimination and they therefore had committed an offense in refusing to answer the questions as to which they had asserted the privilege.

The United States Supreme Court reversed, holding that the convictions violated the due process clause of the Fourteenth Amendment. The Court stated, "After the Commission, speaking for the State, acted as it did, to sustain the Ohio Supreme Court's judgment would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him." 360 U.S. at 425-426, 79 S.Ct. at 1260.

In Cox v. Louisiana, supra, the appellant was convicted for demonstrating "near" the courthouse, in violation of a state statute which proscribed such demonstrations when done with the intent to interfere with, obstruct or impede the administration of justice or to influence any judge, juror, witness or court officer in the discharge of his duty.

The Supreme Court found that the term "near", as used in the statute was not self-explanatory, and that demonstrators would rely on on-the-spot administrative determination as to how near the courthouse a demonstration might take place. The police had given permission for the demonstration to be held across the street from the courthouse and no suggestion or recommendation was made by the police that it should be moved to a greater distance.

The Court deemed the situation in Cox to be analogous to that in Raley, and the conviction was reversed. It held that to sustain a conviction for demonstrating where police officials said the demonstration could take place would be "an indefensible sort of entrapment by the State" and a violation of due process.

In both Raley and Cox affirmative statements were made to the defendants by responsible state or local officials to the effect, in substance, that defendants had the right to act as they did. The defendants acted in justifiable reliance thereon. Nevertheless, despite such representations and reliance, the defendants were prosecuted and convicted for the very acts which were the subject of the representations. Thus, it could be said that they were misled into believing that their course of conduct was not in violation of law and that they would not be prosecuted therefor, when in fact the contrary was true.[2]

The situation in the case at bar is quite different. No representations of any kind were made by the Local Board or the Selective Service System. The Local Board only did what it was required to do when it sent the duplicate card to Kiger.[3] It was under no obligation to answer the statements made in his letter, and no implication that it approved his proposed course of conduct can be drawn from its failure to do so. Nor does the fact that on a previous occasion it had advised him to carry his draft card so as not to be in violation of law impose on it any obligation to comment or admonish him on the later occasion.

Moreover, it is amply plain from the record in this case that Kiger was fully aware at the time he burned his draft card of the amended statute making such an act a crime

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[2] The defendant also refers to United States v. Sansone, 385 F.2d 247 (7th Cir. 1967). The decision in Sansone was grounded upon the United States Customs Agents' failure to follow the requirements of a federal regulation. See also United States v. Jones, 368 F.2d 795 (2d Cir. 1966). *Sansone* is of no relevance here.

[3] See 32 C.F.R. § 1623.7.

and of the fact that his act was criminal. Indeed, he has stressed that the criminality of what he did was one factor which he hoped would help to publicize his protest.

[1] His defense is not aided by the fact that the constitutionality of the amended statute had not been passed upon by any appellate court at the time he burned his card. No one can escape criminal liability for the violation of a statute on the ground that there may be doubts as to its constitutionality. Here, of course, the statute was held constitutional in United States v. O'Brien, supra.

[2] There is nothing here which savors of "implied condonation" or of anything which is tantamount to entrapment. The defense is devoid of merit.

II

[3] The second defense is based upon a distinction between Kiger's draft status and that of the defendant in the O'Brien case. O'Brien was under the age of 22 at the time he burned his draft card, whereas Kiger was classified I–O, was over 26, and in selection group 5.[4] The stipulation of facts in evidence in this case states:

> "On August 12, 1964 Kiger was reclassified I–O and placed in selection group 5. A new Notice of Classification was mailed to Kiger on the same date. From that date until the date of this stipulation [January 17, 1969], the national draft quotas have been such that no person in selection group 5 has been ordered for induction or alternative civilian service. In April, 1968, Local Board 146, New Castle, Indiana [Kiger's Local

[4] See 32 C.F.R. § 1631.7.

Board] ordered one person from selection group 4 for induction after which 9 persons were left in selection group 4."

From this Kiger argues that there was no reasonable ground for anticipating that he would be called for induction and that the statute, if applied to him, would be unconstitutional.

In United States v. O'Brien, supra, the Supreme Court upheld the constitutionality of the draft card mutilation amendment and rejected the argument that the burning of a draft card was symbolic speech entitled to First Amendment protections. The Court applied the following standard: "A government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." 391 U.S. at 377, 88 S.Ct. at 1679. It held that the certificate served valid purposes of the Government, id. at 378-380, 88 S.Ct. 1673 and that Congress was therefore entitled to make mutilation of the certificate a criminal offense.

Kiger's position is that the difference in his draft status from that of the O'Brien defendant requires a different result under the balancing test and that the statute as applied to him violates his First Amendment rights.

This contention is without merit. In the first place, Kiger, having been classified as I-Y,[5] was liable for train-

[5] 32 C.F.R. § 1622.17. Class I-Y includes a registrant who would be classified in Class I-A, I-A-O or I-O "but for the fact that he is found under applicable physical, mental and moral standards

ing and service until he reached age 35.[6] Thereafter classified as I–O (Conscientious Objector), he was liable for civilian service in any emergency up to that age. Even though the probability of his being called may have been slight, the Selective Service System was required to keep track of him until he reached 35. Thus the purposes served by the statute, as found in O'Brien, apply to Kiger.

Moreover, in United States v. Edelman, 384 F.2d 115 (2d Cir. 1967), cert. denied sub nom. Cornell v. United States, 392 U.S. 904, 88 S.Ct. 2051, 20 L.Ed.2d 1363 (1968) (a pre-O'Brien case), the Court of Appeals of this Circuit rejected a similar argument. Prior to Edelman, the court in United States v. Miller, 367 F.2d 72 (2d Cir. 1966), cert. denied, 386 U.S. 911, 87 S.Ct. 855, 17 L.Ed.2d 787 (1967), reh. denied, 392 U.S. 917, 88 S.Ct. 2049, 20 L.Ed.2d 1378 (1968), had laid down the balancing test thereafter followed in O'Brien.

In Miller the defendant was classified I–A. In Edelman two of the defendants were classified 4–F and one was I-O. In addition, one of the defendants was over the age of 26. It was urged in Edelman that the balancing sheet should produce a different result where the interest of the Selective Service System in keeping track of a registrant was less important than in the case of a registrant subject to immediate call. In affirming the conviction, the Court

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to be not currently qualified for service in the Armed Services and who would be qualified for such service in time of war or national emergency declared by the Congress." The I-Y classification was made while defendant was serving a prison term imposed for refusal to perform civilian service as a conscientious objector.

[6] See 50 U.S.C.App. § 456(h)(2) and 32 C.F.R. § 1622.1(a)(3)(ii).

of Appeals rejected this argument, holding that "the Selective Service System might be just as interested in knowing who is not subject to call at a time of emergency as it would be in knowing who is subject to call." United States v. Edelman, 384 F.2d at 117.

The second defense is also without merit.

III

[4] The third defense is based on a novel theory of First Amendment protections. According to the defendant, his First Amendment rights include not only the right to speak freely but also the right to use such means as may be necessary to obtain access to the mass media of communication for the ideas he wishes to express. He claims that only by burning his draft card could he get his ideas widely publicized by the mass media, and that therefore the application of the statute to him would violate his First Amendment rights.

The defendant and two of his associates burned or mutilated their draft cards at a press conference which they called and which was attended by numerous representatives of the mass media of communication. The events which occurred were reported fully in three New York daily newspapers and on major TV and radio stations and thus reached a large audience. One of the defendant's major motivations in burning his draft card was to assure that his protest reached a wide audience through the mass communications media.

Defendant was permitted to bring out at trial that he and his associates did not have sufficient funds available for an advertising of their views in the mass media; that he had been unable to obtain any substantial mass media

coverage for his views though over a long period he had distributed literature and made speeches against war; that the newsworthiness of the draft card burning event lay in large part in the fact that the participants were committing a criminal act; that one of the main factors which determines newsworthiness on TV is dramatic impact on the television audience, and that it was not the policy of CBS News, at least, to accept on-the-spot advertising on controversial subjects.

Defendant argues that these facts demonstrate that he could not have obtained any substantial access to the mass media without the drastic action of publicly burning his draft card and that, therefore, his conduct is entitled to First Amendment protection as "effective" free speech and he cannot be held criminally liable therefor.

No cases are cited which support this novel theory, and I know of none. Defendant, however, refers to the brief concurring opinion of Mr. Justice Harlan in United States v. O'Brien, supra. In agreeing with the principles enunciated by the majority, Mr. Justice Harlan voiced the following caveat:

> "I wish to make explicit my understanding that this passage does not foreclose consideration of First Amendment claims in those rare instances when an 'incidental' restriction upon expression, imposed by a regulation which furthers an 'important or substantial' governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate. This is not such a case, since O'Brien manifestly could have conveyed his message in many

ways other than by burning his draft card." 391 U.S. at 388-389, 88 S.Ct. at 1685 (concurring opinion).

I see nothing in Mr. Justice Harlan's concurrence which supports defendant's contention. Plainly, Mr. Justice Harlan did not view his caveat as applying to O'Brien himself, since he points out that "O'Brien manifestly could have conveyed his message in many ways other than by burning his draft card." Kiger, like O'Brien, had available lawful means to convey his message. Nevertheless, he chose to do so by deliberately committing what he knew to be a criminal act, and he must take the consequences.

Perhaps, as indicated in a recent Harvard Law Review article,[7] the whole subject of access to the mass media should be reexamined from the legislative, administrative and judicial viewpoints. But this is not to say that a person is free to violate a criminal statute in order to get his views carried in the press and on the air. The standards laid down in O'Brien are applicable to the case at bar, and under those standards defendant's conduct in this case is not entitled to the protections of the First Amendment.

[5] It has been proven beyond a reasonable doubt that defendant wilfully and knowingly burned his draft card in violation of 50 App.U.S.C. § 462(b) (3). I find defendant guilty as charged.

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[7] J. Barron "Access to the Press—A New First Amendment Right", 80 Harv.L.Rev. 1641 (1967).

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1363

PETER NIVEN KIGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not yet reported. The opinion of the district court is reported at 297 F. Supp. 339 (S.D.N.Y.) (Pet. App. 3-14).

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1970. Mr. Justice Harlan extended

the time for filing a petition for a writ of certiorari to March 27, 1970, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction for burning his draft card was properly sustained under the principles enunciated in *United States* v. *O'Brien*, 391 U.S. 367.

2. Whether the trial court abused its discretion by refusing to accept petitioner's plea of *nolo contendere*.

STATEMENT

After a non-jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of knowingly destroying and mutilating his Selective Service Notice of Classification certificate (SSS Form 110) in violation of 50 U.S.C. App. 462(b)(3). On April 28, 1969, he was sentenced to imprisonment for a period of three months. The court of appeals affirmed *per curiam*.

The pertinent facts are not in dispute. Petitioner registered with his local Selective Service board (in Greencastle, Indiana) on November 7, 1956, and was classified I-A (App. 22a).[1] On July 13, 1961, petitioner returned his registration certificate and his notice of classification to the local board "as part of

[1] "App." refers to petitioner's appendix in the court of appeals, a copy of which is on file with the Clerk of this Court.

a protest against the preparations for war." Shortly thereafter, in a personal interview, petitioner was advised by the board that he should carry his registration and classification cards so as not to be considered in violation of the law. He was subsequently reclassified I-O and thereafter served a year in prison (June 1962 to June 1963) for refusal to report for alternative civilian service (*ibid.*).

On January 4, 1966, petitioner, then 27 years of age, sent his local board the following letter (App. 29a; Govt. Exh. 6):

> Please send me a new classification card (I-Y, I believe).[2] I do not know the whereabouts of the one which you sent to my home in Dunreith, Ind., in 1963; and I wish to burn one in sympathy with other people who have done so. The above address is my home address now.

Pursuant to this request, the local board prepared a duplicate notice of classification (including petitioner's I-O classification) which was mailed to him on January 13, 1966 (App. 25a).

Subsequently, petitioner burned his notice of classification at a pre-arranged press conference in New York City on March 24, 1966 (App. 25a-26a). At trial he admitted knowing that his action was unlawful (App. 81a) and stated that he destroyed his draft card on that occasion in order to "communicate to a wide audience through the press" (App. 72a).

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[2] In fact, petitioner had been reclassified I-O on August 12, 1964 (App. 24a).

ARGUMENT

1. Petitioner argues that his conduct in publicly burning his notice of classification constituted "symbolic speech" protected by the First Amendment. Recognizing, however, that *United States* v. *O'Brien*, 391 U.S. 367, held to the contrary, petitioner urges this Court to find critical factual distinctions between this case and *O'Brien* or, failing this, to reexamine and overrule *O'Brien*. Those contentions, we submit, are without substance and do not warrant plenary review by this Court.

a. Petitioner argues that his situation is different from the *O'Brien* case, since, unlike the registrant there, petitioner's chances of being drafted were remote at best. This argument fails to recognize, however, that the legitimate congressional purpose in protecting draft cards from destruction, sustained in *O'Brien*, is not necessarily related to the classification of a particular registrant. That purpose is to assure the efficient operation of the Selective Service System (see 391 U.S. at 378-380). Whether a registrant is subject to immediate call or where, as here, there may be little likelihood that the registrant will be required to serve, that purpose is furthered by the statutory prohibition. As the district court pointed out, petitioner (who burned his certificate at age 27) was liable for civilian service until reaching age 35 (see Pet. App. 10-11).

Nor can it fairly be urged (Pet. 29-37) that petitioner had no other method but draft-card burning to reach a significant audience regarding his views on

the Vietnam conflict. Recent history graphically attests to the fact that there are many affirmative, legitimate ways of expressing such dissent in a manner that reaches a vast segment of the population, but which does not constitute the plain violation of a penal statute.

b. It is further contended that the legal status of the statute prohibiting the destruction of draft cards was ambiguous at the time petitioner burned his and that, given this uncertainty, he was misled by the board's failure to warn him of the unlawful character of his intended act, despite the fact that he had made clear that he wanted the duplicate in order to destroy it as an act of protest. Petitioner was well aware, however, that the burning of his draft card violated federal law. Indeed, he depended upon that very illegality to attract the press coverage he sought. Moreover, unlike the *active* misleading by governmental agencies found in *Raley* v. *Ohio*, 360 U.S. 423, and *Cox* v. *Louisiana*, 379 U.S. 559 (on both of which cases petitioner relies), the local board in the instant case was completely silent on the matter. It obviously responded to his request as a matter of normal procedure under 32 C.F.R. 1623.7,[3] deeming that he had made a sufficient showing of loss in his letter. At all events, as the courts below held, the absence of a warning as to the legal conse-

[3] That provision (see Pet. 6) permits the issuance of a duplicate notice of classification at the written request of the registrant upon presentation of proof satisfactory to the local board that the original card has been lost or mislaid.

quences of destruction cannot be construed as approval of petitioner's contemplated act.[4]

c. Nor was the validity of the statute under which petitioner was prosecuted rendered uncertain because its constitutionality had not yet been decided by an appellate court at the time petitioner burned his card. Petitioner cannot escape criminal responsibility for a knowing violation of a congressional command by relying on the hope that the statute might be found unconstitutional sometime in the future.

d. Finally, in urging the Court to reexamine *O'Brien*, petitioner basically marshals the arguments considered and rejected in that case (see Pet. 18-26). There is no more occasion for the Court to overturn that reasoned decision now than there was for it to hold the statute invalid in that case. See *United States* v. *Dancis*, 406 F.2d 729 (C.A. 2), certiorari denied, 394 U.S. 1019.

2. Prior to trial, petitioner proffered a plea of *nolo contendere*. The trial judge withheld his consent to its acceptance, pursuant to Rule 11, F. R. Crim. P. Acceptance or not of such a plea is, under that rule, within the discretion of the judge; his decision in this regard should be upheld absent a showing of abuse. *E.g.*, *Mason* v. *United States*, 250 F.2d 704 (C.A. 10).

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[4] It borders on the frivolous, we submit, to urge that since petitioner had not made a sufficient showing of loss, the board violated the Selective Service regulations in sending him the duplicate and thereby denied him procedural due process.

Petitioner argues, however, that the trial judge was arbitrary in his refusal, in that even apart from certain differing legal consequences, there is a stigma attached to a determination of guilt not present in a *nolo* plea (Pet. 37-40). That a plea of *nolo contendere* might benefit the defendant is not, however, the sole determining factor. The trial court should properly consider, in addition, such factors as the public interest in the proceeding, the effect of the trial as a deterrent, and the nature of the alleged violation. See *United States* v. *Chin Doong Art*, 193 F. Supp. 820 (E.D.N.Y.); *United States* v. *Ultramarine & Color Co.*, 137 F. Supp. 167 (S.D.N.Y.). Here the trial judge announced at the start of the trial that he had given considerable thought to the matter and decided that the case was inappropriate for the acceptance of a *nolo contendere* plea (App. 21a). As the court of appeals held, there is no indication that, in view of all the circumstances, such refusal constituted an abuse of discretion (see Pet. App. 2).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1970.

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